Supreme Court, U.S.
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No. 00-

IN THE

Supreme Court of the United States

STEAKHOUSE, INCORPORATED, a Florida corporation;
INVESTMENT PARTNERS, INCORPORATED,
a Florida corporation,

Petitioners,

v.

THE CITY OF RALEIGH, NORTH CAROLINA,
a North Carolina municipal corporation;
RALEIGH BOARD OF ADJUSTMENT,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether immediate access to the courts following a denial of a permit for operation of an adult-oriented communicative business constitutes prompt judicial review as required by *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990), without regard to the length of time allowed for a judicial decision?

II. Whether a plaintiff denied a special use permit to present sexually oriented live entertainment is entitled to the same standard of prompt judicial review as a business disseminating sexually oriented books, films, magazines, etc.?

III. Whether an ordinance requiring a special use permit to operate a sexually oriented adult business may provide unbridled discretion to issue or withhold special use permits?

IV. Whether a plaintiff bringing a facial challenge to the constitutionality of an ordinance requiring a special use permit for operation of a sexually oriented business must prove that the ordinance has been unconstitutionally applied.

STATEMENT PURSUANT TO RULE 29.6

Petitioners have no parent corporations and no publicly held company owns 10% or more the stock of any of the petitioners.

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STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on February 5, 2001. Petitioners timely filed a Petition for Rehearing en banc on February 20, 2001. The Petition was denied on March 6, 2001. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional provisions

The First Amendment to the Constitution of the United States of America provides that "Congress shall make no law . . . abridging the freedom of speech."

Statutory provisions

The City of Raleigh, North Carolina prohibits the operation of a sexually oriented business through a special use permit scheme. Relevant sections of the Code of the City of Raleigh, North Carolina Ordinances are reproduced at Appendix F.

STATEMENT OF THE CASE

On December 5, 1995, the Raleigh City Council enacted Ordinance No. (1995) 793 TC125 TC-28-95, amending the special use permitting and locational criteria for sexually oriented businesses and amending § 10-2144(b) by adding a new subsection (6). The new subsection (6) requires an applicant for a special use permit to demonstrate that a proposed adult entertainment use will not adversely impact public services and facilities such as parking, traffic, police, etc., and that the secondary effects of such businesses will not adversely impact adjacent properties. The secondary effects enumerated in the ordinance include, but are limited to, noise, light, stormwater run-off, parking, pedestrian circulation and safety. The foregoing criteria are in addition to those in Raleigh City Code § 10-2144(b)(1)-(4) which contain the specific distance restrictions that apply to adult entertainment establishments and ten general factors contained in Code § 10-2141(c). The revision to the Ordinance further restricts the acceptable locations for sexually oriented businesses by *doubling* the separation requirements between adult establishments and residential zoning districts, places of worship, school, specialty schools, day-care facilities and any buffer commercial zoning districts from a 1,000 foot radius to a 2,000 foot radius.

The City of Raleigh Code requires adult cabarets, as defined, to obtain a special use permit regardless of whether they meet the proper zoning criteria and set back requirements from other adult establishments or residential and other specified sensitive uses before being allowed to engage in protected speech. The special use permit applicant must demonstrate that the proposed use will meet all of the requirements of the Ordinance by substantial evidence

throughout the various stages of administrative scrutiny. The application must first be reviewed for compliance by one of the zoning inspectors at a pre-application conference, which is not provided for under the City Code. The application can be rejected if the City determines it to be insufficient. If an application is deemed complete, only then can it be filed with the City Clerk's Office.

The Board of Adjustment then schedules a hearing if a completed application is received at least twenty-one (21) days prior to the next regularly scheduled meeting of the Board of Adjustment. The Special Use Hearing is adjudicatory, with witnesses being sworn and subject to cross-examination. Testimony and argument are recorded. The Board of Adjustment makes a determination and then files a written decision as soon as practicable after the hearing. There is no time frame provided in which a written decision must be filed and served. However, within ten (10) days of the issuance of a written decision, any party, including one's opponent, may move for rehearing.

Within 30 days after the filing of an adverse decision, any party including the City may appeal the written decision by writ of certiorari to the Superior Court, pursuant to North Carolina GS 160A-388. The Superior Court at its discretion may choose to hear the case. If there is no appeal within the 30-day period, the Board of Adjustment's decision becomes final. However, if the permit is granted and a grading permit, building permit or certificate of occupancy for the permitted use is not obtained by the applicant within six (6) months of the date of the decision, a special use permit issued by the Board is deemed to have expired. In the event a special use permit is denied, an applicant may not reapply for a one-year period. There are no time limits imposed on the decision

making process for a special use permit. Decisions must be made as soon as practicable. Further, although a writ may be filed in the state courts, there is no guarantee that the court will accept jurisdiction. If the Superior Court accepts jurisdiction, there is no time frame in which a judicial decision must be rendered and no restriction on continuances extensions of time for briefing and oral argument.

The Board of Adjustment may impose conditions and safeguards on the grant of the special use permit. If any of the conditions are held to be invalid, then the decision to grant such a permit shall be void and of no effect. The Board of Adjustment may continue a proceeding based on an applicant or other party's request or on its own motion. The decision whether or not to continue a hearing is at the sole discretion of the Chairman of the Board. Finally, the Special Use Permit can be revoked, modified, suspended, or additional conditions imposed upon the permittee by the Board of Adjustment at a future date.

On November 13, 1996, Petitioner Steakhouse filed an application with the City of Raleigh Planning Department requesting approval of a site plan for a restaurant and lounge, the only applicable category of use under the City of Raleigh Code, on a site that met all location and zoning criteria for man adult business. On November 13, 1996, Petitioners filed an Application for a Special Use Permit to offer live performances including, but not limited to, erotic dancing. The Board of Adjustment planned to hear the application at its next meeting on December 9, 1996. At the request of Petitioner's former counsel the hearing was continued until the January 13, 1997 meeting of the Board of Adjustment. On December 12, 1996, the City of Raleigh Planning Commission unanimously adopted a certified

recommendation for approval of Petitioner's site plan. The certified recommendation appeared on the City Council Agenda for January 7, 1997, but was taken off the agenda and was tabled indefinitely after the City learned of Petitioner's intention to disseminating sexually oriented speech.

On January 13, 1997, a public hearing was held before the Raleigh Board of Adjustment. A member of the Board of Adjustment sought to continue the hearing for thirty days, indicating time was not of the essence. One of the Petitioners was forced to waive evidentiary objections to certain evidence in order for the Board of Adjustment to proceed with the hearing without delay. At the conclusion of the hearing the Board of Adjustment voted to deny special use permit for the following reasons:

> (1) the applicant failed to present competent, material and substantial evidence sufficient to show compliance with the off-street parking requirements of the Raleigh City Code;
>
> (2) the applicant failed to present competent, material and substantial evidence sufficient to show the proposed use would not adversely impact public services and facilities;
>
> (3) the applicant failed to meet the requirements of Raleigh City Code §10-2144(b)(6); and

On March 5, 1997, Appellants Steakhouse and Investment Partners filed a Verified Complaint for Temporary Restraining Order, Preliminary and Permanent Injunctive Relief and Declaratory Judgment, alleging a

deprivation of their First Amendment rights through unconstitutional zoning and permitting provisions and practices which failed to provide constitutionally mandated time limits for issuance or denial of a special use permit, failed to provide prompt judicial review of a special use permit denial, and failed to cabin the decision makers' discretion, Petitioners filed a Motion for Temporary Restraining Order and an Application for Preliminary Injunction and Memorandum in Support. One week later, on March 28, 1997, the District Court entered an Order denying Petitioners' request for a temporary restraining order and set a hearing for April 21, 1997 on the Petitioners' Application for Preliminary Injunctive Relief. The hearing was held prematurely on April 18, 1997. On September 4, 1997, nearly five months later, the District Court entered its Order denying preliminary injunctive relief. Petitioners' filed their Notice of Appeal on September 29, 1997. On January 21, 1999 a panel of the Fourth Circuit Court of Appeal affirmed, finding the subject ordinances to be constitutional.

On March 17, 1999, the District Court entered its Order granting the City of Raleigh's Motion for Summary Judgment. The District Court held that the parties' dispute regarding the constitutionality of the Raleigh Special Use Permit Procedure as applied to topless dancing establishments was entirely a question of law. The District Court held that it need not address this question of law in detail because the Fourth Circuit Court of Appeals had already determined the Raleigh Special Use Procedure to be constitutional in the prior interlocutory appeal. In response Petitioners appealed to the Fourth Circuit Court of Appeals. On February 5, 2001 for the Fourth Circuit Court of Appeals affirmed based on its prior ruling. The Court failed to address the facial challenge to the special use permit procedure brought by Petitioner Investment Partners.

REASONS FOR GRANTING THE WRIT

The case is about a municipality's ability to suppress disfavored speech dealing with human sexuality under the auspices of a permitting scheme. The Petition should be granted for three reasons. First, the Fourth Circuit's decision is contrary to the decisions of other Federal Circuit courts and highlights a conflict among the Circuit courts regarding the application of the procedural safeguards of *Freedman v. Maryland* as applied to adult-oriented business in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 110 S. Ct. 596, 107 L. Ed. 2d 603 (1990), particularly as it relates to the meaning of "prompt judicial review." Review should be granted to resolve this conflict and provide a uniform standard for permit denial for speech related businesses.

Second, this Court should clarify the permissible limits of administrative discretion given administrative officials to determine whether to issue or deny special use permits to operate a sexually oriented adult business. This Court's holdings that substantial governmental interests can support a restriction on protected speech in order to combat or adverse secondary effects has given rise to a tidal wave of municipal regulation. This Court should clarify the limits by which these restraints may be imposed to regulate such secondary effects.

Third, the Fourth Circuit's decision violates the right to bring a facial challenge to the constitutionality of a permit ordinance without proving that the ordinance has been unconstitutionally applied. The Fourth Circuit foreclosed Petitioner's Steakhouse's opportunity to bring a facial challenge to the City of Raleigh Code because Petitioner was unsuccessful on the merits of the permitting process. The court failed to address Petitioner Investment Partners' facial challenge to the City's special use procedure. Therefore, the Petition should be

granted to clarify that a party is not foreclosed from bringing a facial challenge for attempting to comply with an unconstitutional permit scheme.

I. Certiorari is Warranted To Resolve The Conflict Among The Circuit Courts And This Court In Providing Prompt Judicial Review Of A Permit Denial As Required By *FW/PBS, Inc. v. City of Dallas.*

The ruling of the Fourth Circuit is in direct conflict with this Court's decisions in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 347, 110 S. Ct. 596, 107 L. Ed. 2d 603 (1990) and *Southeast Promotions Ltd. v. Conrad*, 420 U.S. 546, 43 L. Ed. 2d 448, 95 S. Ct. 1239 (1975).

In *FW/PBS, Inc. v. City of Dallas*, this Court applied two of the three procedural safeguards of *Freedman v. Maryland*, 380 U.S. 51 (1965) to prior restraints affecting adult-oriented communicative businesses. In *FW/PBS*, the Fifth Circuit found a City of Dallas ordinance regulating adult-oriented businesses constitutional as a content-neutral time, place and manner regulation and not subject to facial attack because it was "designed to serve a substantial governmental interest" and allowed for "reasonable alternative avenues of communication." *FW/PBS, Inc. v. City of Dallas*, 837 F.2d 1298, 1303 (5th Cir. 1988). Existing law would have exempted the licensing provision from prior restraint scrutiny because it was allegedly not aimed at a particular message or at identifiable speakers. However, on *certiorari*, this Court affirmed in part, reversed in part, vacated in part, and remanded. Six members of this Court agreed that the licensing scheme, as enforced against businesses engaged in activity protected by the First Amendment, lacked "essential" procedural safeguards

required by *Freedman*, and, therefore, violated the First Amendment to the U.S. Constitution. *FW/PBS*, 493 U.S. at 224-27. This Court held that whenever the government imposes a prior restraint on protected adult-oriented communicative speech through a permit scheme, that scheme must contain both a specified brief time period for approval or denial of the license by the government body and a prompt judicial review of an adverse decision. *See FW/PBS*, 493 U.S. at 228 ("there must be the possibility of prompt judicial review in the event that the license is erroneously denied.")

In *Freedman* the Court made it clear that the term "prompt judicial review" meant more than mere prompt access to the judicial system:

> Any restraint imposed in advance of a final judicial determination on the merits must similarly be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution. Moreover, we are well aware that, even after expiration of a temporary restraint, an administrative refusal to license, signifying the censor's view that the film is unprotected, may have a discouraging effect on the exhibitor. *See Bantam Books, Inc. v. Sullivan*, *supra*. Therefore, the procedure must also assure a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license.

380 U.S. at 59.

Despite the clear definition of prompt judicial review set forth by this Court in *Freedman*, the Circuit courts have issued conflicting opinions as to the appropriate standard for prompt judicial review. As this Court pointed out in *City News & Novelty, Inc. v. City of Waukesha*, 2001 WL 37653 (January 17, 2001), there is a split among the Circuits as to the meaning of the phrase.

Currently the First, Fifth, and Seventh and Eleventh Circuits hold that mere access to judicial review, at least as far as the denial of adult entertainment business is concerned, satisfies the prompt judicial review requirement. *See TK's Video, Inc. v. Denton County*, 24 F.3d 705, 709 (5th Cir. 1994). *Graff v. City of Chicago*, 9 F.3d 1309, 1324-25 (7th Cir. 1993) (en banc); *Jews for Jesus, Inc. v. Mass. Bay Transp. Auth.*, 984 F.2d 1319, 1327 (1st Cir. 1993); *Boss Capital, Inc. v. City of Casselberry*, 198 F.3d 1251, 1255 (11th Cir. 1999), *cert. denied*, 120 S. Ct. 1423 (2000), ("[We] agree with the First, Fifth and Seventh Circuits and hold that access to prompt judicial review is sufficient *for adult entertainment licensing ordinances.*")

The Sixth and the Ninth Circuits have rejected the standard of mere access to judicial review as satisfying the prompt judicial review requirement of *Freedman* and *FW/PBS. See Baby Tam & Co. v. City of Las Vegas*, 154 F.3d 1097, 1101-02 (9th Cir. 1998); *11126 Baltimore Boulevard, Inc. v. Prince George's County*, 58 F.3d 988, 998-1001 (4th Cir. 1995) (en banc); *cf. East Brooks Books, Inc. v. City of Memphis*, 48 F.3d 220, 224-25 (6th Cir. 1995) (state certiorari procedures an insufficient guarantee of prompt judicial review). As the Seventh Circuit acknowledged "[a] person always has a judicial forum when his speech is allegedly infringed." *Graff*, 9 F.3d at 1324.

Thus, to hold that mere access to judicial review fulfills the second *Freedman* safeguard makes the safeguard itself meaningless. We conclude that "prompt judicial review" means the opportunity for a prompt hearing and a prompt decision by a judicial officer.

The Second Circuit is unclear as to the appropriate standard for prompt judicial review. The Second Circuit appears to require both prompt access to a court and, in some circumstances, a guarantee of a prompt judicial decision. Compare *Beal v. Stern*, 184 F.3d 117, 129 (2d Cir. 1999), (holding an ordinance requiring a permit to engage in political speech in a public park which allowed prompt judicial access to the courts through a common-law certiorari proceeding satisfied *Freedman*) and *MacDonald v. Safir*, 206 F.3d 184, 195 (2d Cir. 2000) (stating that New York's common-law certiorari procedure may not meet the prompt judicial review requirement if it does not mandate a prompt judicial decision.)

The Fourth Circuit, prior to this case, held that a prompt judicial resolution is required to satisfy *Freedman* and *FW/PBS*. The Fourth Circuit, *en banc*, in a case involving application of a similar scheme to an adult bookstore, that a prompt judicial determination was constitutionally mandated required. *11126 Baltimore Blvd., Inc. v. Prince George's County*, 58 F.3d 988, 994 (4th Cir. 1995) (en banc), *cert. denied*, 516 U.S. 1010 (1995). In the instant, case the Fourth Circuit attempts to set up a two-tiered system for prompt judicial review of sexually oriented material: prompt access to courts for live performances and prompt judicial determination for adult bookstores and printed materials. This decision creates even more confusion for local governments attempting to decipher the appropriate standard for prompt judicial review.

At the time of the filing of the Complaint and continuing until present, the City of Raleigh Code contains the identical deficiency found by the Fourth Circuit in *11126 Baltimore Boulevard.* Judicial review of a denial of a special use permit is to petition for writ of certiorari. The Ordinance by its language does not expressly provide for judicial review. The Rules of Procedure for the Board of Adjustment have been amended to provide that the Board of Adjustment will stipulate to any petition for certiorari to the State court. The Fourth Circuit Court attempted to immunize the North Carolina writ of certiorari procedure by pointing to these changes in the procedures of the Board of Adjustment. These procedural revisions were made by an independent body and are not part of the Raleigh Code. The decision in *11126 Baltimore Boulevard* clearly forecloses such an argument even if the Board of Adjustment changed its procedures after the hearing on Petitioners' Motion for Preliminary Injunction.

In this case the review period is facially unconstitutional for failing to provide prompt judicial review. The only review procedure from an adverse ruling of the Board of Adjustment is the right to seek certiorari in the Superior Court of North Carolina. The Superior Court is limited to appellate review of the record; constitutional challenges to the ordinances are considered collateral. *Forsyth County v. York*, 19 N.C. App. 361, 198 S.E.2d 770 (1973). If an aggrieved party wishes to make constitutional attacks, a separate lawsuit must be filed. Obviously, such a lawsuit proceeds in the normal flow of litigation with time periods for responsive pleadings and discovery, which clearly cannot be categorized as "prompt" review.

The Circuit courts have expressed confusion as to the treatment of non-obscene sexually oriented nude performance as protected speech since the *Barnes* decision. The Sixth Circuit noted in *Triplet Grill, Inc. v. City of Acron*, 430 F.3d 129 (6th Cir. 1994) that attempting to discern a cogent legal standard from *Barnes* was akin to reading tea leaves. *Id.* at 133-134. Similarly the Fifth Circuit recently struggled with the meaning of *Barnes* in *J&B Entertainment, Inc. v. City of Jackson, Mississippi*, 152 F.3d 362 (1998), and held that a challenge to an ordinance banning nudity would be analyzed under an intermediate scrutiny standard of review in which the government bears the burden of satisfying both the burden of production and persuasion. In fact, the Fifth Circuit still requires that the government justify any ban on public nudity by showing objective evidence of purpose such as a study or findings. According to the Fifth Circuit, quoting the Third Circuit in *Phillips v. Borough of Keyport*, 107 F.3d 164 (3d Cir. 1997) (*en banc*) to insist on less is to reduce the First Amendment to a charade. *Id.* at 178. *Also see Pap's A.M. v. City of Erie*, 719 A.2d 273 (Pa. 1998).

In *Southeastern Promotions v. Conrad*, a case cited by the Fourth Circuit for the proposition that the protections afforded to live entertainment may vary from the protections afforded other media, this Court found that the nude performance of scenes in *Hair* were deserving of protection and applied the safeguards of *Freedman* to such performances. Prior to the Fourth Circuit's opinion below, no court has held that performances involving nude dancing deserve such a low amount of protection that procedural safeguards would not be applied against the suppression of such speech.

The decision below is in conflict with both this Court's decisions in *FW/PBS, Inc. v. City of Dallas* and *Southeastern Promotions, Ltd. v. Conrad*, as well as with the *en banc* decision of the Fourth Circuit in *11126 Baltimore Boulevard v. Prince Georges*. The Fourth Circuit's decision to dispense with essential procedural safeguards based on the content of the speech, or the context of sexually-oriented speech in the form of live performances, is at odds with this Court's decision. Therefore this Court should grant the petition to establish that all protected speech, even "fringe" or speech at the "outer-perimeter," must be granted the procedural safeguards established by this Court.

II. This Court Must Clarify Acceptable Objective Standards By Which Governmental Discretion Must Be Limited In Determining Whether To Issue Or Withhold A Special Use Permit To Operate A Sexually-Oriented Adult Business.

This Court has clearly established that permitting protected government officials and bodies cannot have unbridled discretion in permitting speech.

> [A] scheme that places "unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship." *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 757 (1988). *See Saia v. New York*, 334 U.S. 558 (1948); *Niemotko v. Maryland*, 340 U.S. 268 (1951); *Kunz v. New York*, 340 U.S. 290 (1951); *Staub v. City of Baxley*, 355 U.S. 313 (1958); *Freedman v.*

Maryland, 380 U.S. 51 (1965); *Cox v. Louisiana*, 379 U.S. 536 (1965); *Shuttlesworth v. Birmingham*, *supra*; *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947 (1984).

> "It is settled by a long line of recent decisions of this Court that an ordinance which . . . makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official — as by requiring a permit or license which may be granted or withheld in the discretion of such official — is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms." *Shuttlesworth*, *supra*, 394 U.S., at 151 (*quoting Staub*, *supra*, 355 U.S., at 322).

493 U.S. at 225-26.

Laws subjecting the exercise of First Amendment freedoms to a prior restraint of a license are unconstitutional without narrow, objective, and definite standards to guide licensing authority. *Shuttlesworth v. Birmingham*, 394 U.S. 147, 150-51, 89 S. Ct. 935, 22 L. Ed. 2d 162 (1969). *See also FW/PBS.*

The danger of censorship is so great when excessive discretion exists that this Court has held that "No matter how many procedural safeguards may be imposed, any system which permits governmental officials to inhibit or control the flow of disturbing and unwelcome ideas to the public

threatens serious diminution of the breadth richness of our cultural offerings." *Southeastern Promotions v. Conrad*, 420 U.S. at 564, 95 S. Ct. at 1239, 43 L. Ed. 2d 448 (1975) (Douglas J. dissenting).

In *11126 Baltimore Boulevard, Inc.* the Fourth Circuit, sitting *en banc*, echoed these principles, saying

> [P]ermitting government officials unbridled discretion in determining whether to allow protected speech presents an unacceptable risk of both indefinite suppression and chilling of protected speech. Without the constraint of specific standards to guide the decision maker in judging whether a license should issue, an impermissible danger exists that a government official may decide to exercise his judgment to suppress speech he personally finds distasteful or that an applicant may feel compelled to censor his own speech. And, without procedural safeguards to ensure a prompt resolution, an applicant may conclude that seeking a determination is too burdensome a task to pursue, impermissibly chilling the exercise of protected speech.

Id. at 994 (citations omitted).

Petitioners contend that the Special Use Permit procedures of the City violate these well-settled principles by imbuing administrative officials with excessive substantive discretion to deny a license. For example, § 10-2144(b)(6) requires an applicant to prove that "the proposed use will not adversely impact public services and facilities

such as parking, traffic, police, etc. and that the secondary effects of such uses will not *adversely impact* on adjacent properties." However, throughout earlier sub-sections of the same provision, the Code repeatedly refers to the "serious objectionable operational characteristics" of such businesses as a basis for their special zoning requirements and distance restrictions. "The prime constitutional concern in a case such as this one is the threat that a licenser, unconstrained by narrow, objective criteria, will covertly discriminate against constitutionally protected speech, and later craft 'findings' that more closely conform to constitutional standards." *3570 East Foothill Boulevard, Inc. v. City of Pasadena*, 912 F. Supp. 1268 (C.D. Cal. 1996). "This problem is especially acute with politically unpopular, but protected forms of speech such as erotica." *Id.* In this case, the Code vests virtually unbridled discretion and absolute power in the Board of Adjustment. For example, there is no express limitation in what criteria the Board may use to determine the adverse impact on public services such as police. Allowing the suppression of protected speech in that it may adversely impact police services is constitutionally indistinguishable from the ordinances struck down in *Shuttlesworth*. Although other adult entertainment codes provide civil disabilities for operators with convictions of specified criminal acts, the Raleigh City Code does not specify any particular criminal acts and allows the Board of Adjustment unbridled discretion to determine which criminal acts or requirements for police services it will use to disqualify an applicant. Further, the First Amendment problem with language such as that contained in § 10-2144(b)(6) is that there is no objective standard to determine what persons or places are eligible for such a permit.

The City of Raleigh's Special Use procedure is merely a shell game which can be applied in a manner to preclude all alternative avenues of communication for sexually oriented speech. In *Lady J. Lingerie, Inc., et al. v. City of Jacksonville*, Case No. 98-2088 (11th Cir. May 27, 1999) the Eleventh Circuit found a similar zoning/licensing ordinance facially unconstitutional. The Jacksonville Land Use Code like the Raleigh Code specified procedures for obtaining a special exception. The procedures in the Jacksonville Land Use Code like the Raleigh Code applied to all sorts of applicants in addition to adult businesses. The Jacksonville Code contained criteria the zoning board must consider in deciding whether or not to grant theses exceptions. Like the applicable provisions in the Raleigh Code, the Eleventh Circuit found these provisions to be "run-of-the-mill" zoning considerations: compatibility with continuance uses, environmental impact, effective pedestrian traffic, and so on. But the Eleventh Circuit characterized those considerations as a floor noting that the Jacksonville Code permits the Board to impose more restrictive requirements on adult businesses. Similarly, in the case before the Court the City of Raleigh Code also permits the Board to impose more restrictive requirements on such businesses.

The Eleventh Circuit in *Lady J.* went on to review the criteria set forth both individually and collectively which empowered the Zoning Board to make such a determination. The Eleventh Circuit found that they empowered the Zoning Board to covertly discriminate against adult entertainment establishments under the guise of "compatibility" or "environmental" considerations. This is exactly the same argument raised by Petitioner Steakhouse both at the trial court level and on appeal. The Eleventh Circuit has rejected

the broad degree of discretion provided in the Jacksonville Land Use Code which is similar to that provision in the Raleigh Code which are the subject of this case. The Eleventh Circuit made it clear that the city may still use that criteria for applicants who are not entitled to First Amendment protection holding that the application of otherwise-valid zoning criteria to adult businesses like Appellants in that case to be troublesome.

The Raleigh City Code suffers another closely related constitutional defect. In *City of Lakewood v. Plain Dealers Publishing Co.*, 486 U.S. 750 (1988), this Court struck down an ordinance that required owners to obtain annual permits to place newsracks on public property. The mayor was given broad authority to grant or deny permits. Further, the mayor was empowered to grant permits subject to "such other terms and conditions deemed necessary and reasonable" by the mayor. *Id.* The court found this provision to be facially unconstitutional because it gave the mayor unbridled discretion to impose terms which could result in the effective denial of permits. The Raleigh City Code suffers the same constitutional infirmities as it provides the Board of Adjustment with unlimited power to impose terms and conditions which can effectively suppress protected speech. For example, a condition of a special use permit could severely limit the hours of operation for an adult establishment on a case by case basis making it unfeasible to operate. In the event such condition is challenged and ultimately overturned, the code invalidates said special use permit in *toto*.

Petitioners assert that the City of Raleigh's Special Use Permit Procedure is an unconstitutional prior restraint on speech because it neither provides a definite and reasonable

limitation on the time within which a decision whether to issue or deny a permit must be made, nor does it provide for prompt judicial review in the event of a permit denial. Petitioners further contend that the City of Raleigh Code does not impose adequate standards to guide the discretion of the permitting officials, fails to compel the issuance of a permit and allows the City of Raleigh and opponents of an establishment to effectively veto a special use permit if granted by the Board of Adjustment.

A. This Court Should Mandate A Brief Time Period To Approve or Deny Special Use Permits For Sexually Oriented Adult Business Uses Pursuant To *FW/PBS* As An Objective Standard To Limit State Discretion.

This Court stated in *Freedman* that brief defined time periods must exist for permitting procedures and prompt judicial review, saying "[B]ecause only a judicial determination in an adversary proceeding ensures that necessary sensitivity to freedom of expression . . . [a]ny restraint imposed in advance of a final judicial determination on the merits . . ." is unconstitutional unless it is "limited to the preservation of the status quo for shortest fixed period [of time]." *Freedman*, 380 U.S. at 58-59. Additionally any time frame established must be actual and not subject to manipulation through the discretion of the government.

In *FW/PBS*, this Court approved the application of two of three *Freedman* prongs to the Dallas licensing scheme for adult entertainment businesses and found it facially unconstitutional as applied broadly to First Amendment protected businesses for failure to provide an effective limitation on the time for the licensor's decision. The Court

did not impose different procedural safeguards for the adult cabaret plaintiffs and adult bookstore plaintiffs as this Court has done in the case at bar. Rather, the Court required these two *Freedman* prongs to be adhered to in all circumstances explaining the core policy of *Freedman* is that the license for a First Amendment-protected business must be issued within a reasonable period of time, because undue delay results in the unconstitutional suppression of protected speech. *FW/PBS* at 606.

In *FW/PBS* the licensing scheme was held facially unconstitutional because it was conceivable that the inspection requirements contained in the code could be used to delay the issuance of a license despite the fact that the Ordinance expressly provided for approval of a license by the Chief of Police within thirty days after receipt of an application. *Id.* at 227. Even though there was no evidence that the inspection requirements had ever been used to delay the issuance of a license and even though an express thirty-day provision appeared to contemplate completion of the inspections, this Court held that a license conceivably could be suspended indefinitely awaiting inspections. In *FW/PBS* this Court found that lack of an actual, brief specified period in which to grant or deny a license to be an abuse of unbridled discretion. The Raleigh code suffers from the identical defect.

B. Locational Criteria of Special Permitting Schemes Should Constitute An Objective Standard For Demonstrating A Lack Of Negative Secondary Effects For The Purpose of Issuing A Special Permit For Operation Of An Adult-oriented Sexual Business.

The City of Raleigh enacted a zoning ordinance providing for licensing requirements and geographical restrictions and setbacks to limit the area in which an adult-oriented establishment could lawfully operate. Thus, the City of Raleigh has taken into consideration the adverse secondary effects generated by such businesses and chose to disperse such effects by the 2,000 foot distance requirements in the code as well as by the requirement that adult establishments only be allowed in certain zoning categories.

Petitioner Steakhouse's proposed location met all of the zoning and locational criteria including set back requirements under the City of Raleigh Code. Since the City of Raleigh can support such distance and zoning limitations only by a reasonable belief that such businesses create adverse secondary effects, then to require an applicant for a special use permit to prove it does not create any adverse secondary effects is to cause the applicant to prove a negative.

The fact that the City of Raleigh can still suppress such businesses even after they meet all such zoning and licensing criteria is what makes the subject ordinance so blatantly unconstitutional.

III. A Plaintiff Must Be Afforded The Due Process Right To Challenge Facially A Permit Scheme Restricting Adult-oriented Communicative Speech Prior To A Showing Of An Unconstitutional Application Of The Ordinance To The Plaintiff.

It is well established that when a licensing statute vests unbridled discretion in a administrative body to decide whether to deny or issue a special use permit, one who is subject to them scheme may bring a facial challenge to it without the necessity of being denied a license. *See City of Lakewood*, 486 U.S. 750, 108 S. Ct. 2138, 100 L. Ed. 2d 771 (1988), (quoting *Freedman*), and *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 104 S. Ct. 2118, 2125 n.15, 80 L. Ed. 2d 772 (1984), this Court held in *FW/PBS* held that where a licensing "scheme creates a '[r]isk of delay,' such that 'every application of the statute create[s] an impermissible risk of suppression of ideas,' we have permitted parties to bring facial challenges." *FW/PBS*, 493 U.S. at 223-224.

When an administrative decision maker is given freedom to determine at his discretion whether to issue or deny a permit request, the lack of standards for the decision makes it impossible to discern a legitimate permit denial from an illegitimate censorship.

> Standards provide the guideposts that check the licensor and allow courts to determine whether the licensor is discriminating against disfavored speech. Without these guideposts, post hoc rationalizations by the licensing official and the use of shifting or illegitimate criteria are far too easy, making it difficult for courts to determine

> in any particular case whether the licensor is permitting favorable, and suppressing unfavorable, expression.

Lakewood, 486 U.S. at 758.

The ordinance in this case grants for too much discretion to the decision maker, making it impossible to distinguish the legitimate from the illegitimate. The discretion allowed the Board of Adjustment casts doubt on any denial of a special use permit for sexually explicit forms of speech. Consequently, this Court should grant this Petition to review the City of Raleigh Code as a prior restraint on protected speech.

CONCLUSION

The City of Raleigh Special Use Permit Scheme for Sexually Oriented Businesses allows the City of Raleigh to suppress speech the City disfavors. Even when an applicant meets the City's stringent zoning and location criteria the City of Raleigh Special Permit Procedure allows censorship to prevail. The City's Permit Scheme renders this Court's mandate of alternative avenues of communication meaningless. The decision below is a drastic departure from the protections afforded live performances involving nudity. The City's Special Use Permit Scheme is a shell game and classic prior restraint that must not be allowed to stand. Again, "No matter how many procedural safeguards may be imposed, any system which permits governmental officials to inhibit or control the flow of disturbing and unwelcome ideas to the public threatens serious diminution of the breadth richness of our cultural offerings." *Southeastern Promotions v. Conrad*, 420 U.S. at 564, 95 S. Ct. at 1239, 43 L. Ed. 2d 448 (1975) (Douglas J. dissenting). This petition for Certiorari must be granted to review the decision of the Court of Appeals, and to resolve the conflict and confusion below.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DATED AND DECIDED FEBRUARY 5, 2001

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 99-1542

STEAKHOUSE, INCORPORATED, a Florida corporation; INVESTMENT PARTNERS, INCORPORATED, a Florida corporation,

Plaintiffs-Appellants,

v.

THE CITY OF RALEIGH, NORTH CAROLINA, a North Carolina municipal corporation; RALEIGH BOARD OF ADJUSTMENT,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. Terrence W. Boyle, Chief District Judge. (CA-97-177-5-B0)

Argued: June 5, 2000

Decided: February 5, 2001

Before WILKINSON, Chief Judge, and MICHAEL and MOTZ, Circuit Judges.

* * *

Appendix A

OPINION

PER CURIAM:

Appellants Steakhouse and Investment Partners challenge the constitutionality of the City of Raleigh's special use permit procedure for adult establishments. This appeal is part of Steakhouse's continuing effort to erect a topless dancing bar in Raleigh. In 1999, after an exhaustive review of the parties' arguments and submissions, we held that appellants had demonstrated little likelihood of prevailing on the merits of their challenge. *See Steakhouse, Inc. v. City of Raleigh*, 166 F.3d 634 (4th Cir. 1999). Appellants have put forth nothing more that persuades us that their claims have any merit. We therefore affirm the judgment of the district court for the reasons stated in our earlier decision.

I.

The relevant facts of this case are set forth in our earlier opinion affirming the district court's denial of a preliminary injunction. *See Steakhouse*, 166 F.3d 634. At that stage of the case, we found, *inter alia*, that the city has a legitimate interest in combating the secondary effects of topless barroom dancing, *see id.* at 636-38, that Raleigh's special use permit scheme sufficiently cabins the Board of Adjustment's discretion, *see id.* at 638-40, and that the city has provided adequate procedural safeguards for the consideration of a permit application, *see id.* at 640-41, including prompt judicial review on the merits, *see id.* at 641-42.

Appendix A

In January 1998, while the earlier appeal was pending, the city moved for summary judgment. In March 1999, after the motion had been briefed and the district court had the benefit of our prior opinion, the city's motion was granted and the case was dismissed. The district court observed that it "need not address this question in detail, because the Fourth Circuit already has." Appellants now ask us to reverse the district court.

Appellants, however, raise no new fact or point of law that would lead us to alter our earlier conclusions. Rather, appellants essentially assert that our earlier decision was incorrect. We respectfully disagree. Our prior opinion has addressed appellants' arguments and found them to be without merit. For the same reasons, we reject these arguments today.

Indeed, the Supreme Court's recent decision in *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000), reinforces our earlier conclusions. In that case, the Court entertained a challenge by the operator of a nude dancing establishment to the constitutionality of a city ordinance banning public nudity. The Court rejected this challenge, with four Justices concluding that the ordinance was a valid content-neutral regulation and two Justices voting to dismiss the case as moot but stating that they would otherwise reject the challenge on the merits. *See City of Erie*, 529 U.S. at 289-302 (plurality opinion of O'Connor, J.); *id.* at 302-10 (Scalia, J., concurring in the judgment). The plurality rested its opinion primarily on the city's legitimate interest in combating the well-recognized secondary effects associated with adult entertainment establishments. *See City of Erie*, 529 U.S. at

289-302; *see also City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *City of Erie*, 529 U.S. at 310 (Souter, J., concurring in part and dissenting in part). We likewise recognize Raleigh's significant interest in curtailing the various harmful phenomena that topless bars often produce and hold that the city has vindicated this interest in a manner consistent with the Constitution.

We need not address the question of whether our prior opinion constitutes the law of the case in any formal sense. Rather, we simply adhere to our prior conclusions and find no reason to revisit them.

II.

The judgment of the district court is accordingly

AFFIRMED.

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 99-1542
CA-97-177-5-BO

STEAKHOUSE, INCORPORATED, a Florida corporation;
INVESTMENT PARTNERS, INCORPORATED,
a Florida corporation,

Plaintiffs – Appellants,

v.

THE CITY OF RALEIGH, NORTH CAROLINA,
a North Carolina municipal corporation;
RALEIGH BOARD OF ADJUSTMENT,

Defendants – Appellees.

Appeal from the United States District Court for the
Eastern District of North Carolina at Raleigh

JUDGMENT

In accordance with the written opinion of this Court filed this day, the Court affirms the judgment of the District Court.

/s/ Patricia S. Connor
CLERK

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, WESTERN DIVISION DATED MARCH 15, 1999 AND FILED MARCH 17, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

No. 5:97-CV-177-BO(1)

STEAKHOUSE, INC., a Florida Corporation, and
INVESTMENT PARTNERS, INC., a Florida Corporation,

Plaintiffs,

v.

THE CITY OF RALEIGH, NORTH CAROLINA,
a North Carolina municipal corporation, and
RALEIGH BOARD OF ADJUSTMENT,

Defendants.

ORDER

This matter is before the Court on Defendants' Motion for Summary Judgment. The underlying complaint alleges that the City of Raleigh's Development Regulations violate Plaintiffs' First and Fourteenth Amendment rights insofar as the Regulations require "special use" approval as a precondition to Plaintiffs' operation of one or more topless dancing establishments in the City of Raleigh.

Appendix B

BACKGROUND

Section 10-2144 of the Raleigh City Code's Development Regulations ("Code") requires "special use" approval by the Raleigh Board of Adjustment as a precondition to opening and operating topless dancing establishments within the City of Raleigh. Plaintiffs seek to open and operate at least one topless dancing establishment within the City of Raleigh.

Plaintiff Steakhouse applied to the Raleigh Board of Adjustment for a special use permit to open and operate a topless dancing establishment, and on January 13, 1997, that application was denied. The grounds for denial included concern that the proposed establishment would adversely impact public services and facilities such as parking, traffic, and police protection. Plaintiffs filed suit in this Court on March 21, 1997, seeking injunctive relief and declaratory judgment that the special use permit requirement of the Code is unconstitutional.[1]

On September 4, 1997, this Court denied Plaintiff's request for a preliminary injunction. Plaintiffs appealed to the Fourth Circuit, and on January 21, 1999, the Fourth Circuit upheld this Court's denial of injunctive relief. *See Steakhouse, Inc. v. City of Raleigh*, 166 F.3d 634. As discussed below, the Fourth Circuit's opinion explains that "Raleigh's special use permit process is not unconstitutional as it pertains to topless dancing bars." *Id.* at 642.

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1. Plaintiffs also had the option of filing a petition for certiorari in the Superior Court of the State of North Carolina, appealing the Board of Adjustment's decision. *See* N.C.G.S. § 160A-388. They chose instead to proceed in this Court.

Appendix B

On January 30, 1998, while Plaintiffs' appeal was pending, Defendants filed a Motion for Summary Judgment. This motion has been fully briefed and is ripe for ruling.

ANALYSIS

A motion for summary judgment cannot be granted unless there are no genuine issues of material fact for trial. Fed. R. Civ. P. 56(c); *See Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). The movant must demonstrate the lack of a genuine issue of fact for trial, and if that burden is met, the party opposing the motion must "go beyond the pleadings" and come forward with evidence of a genuine factual dispute. *Id.* at 324 (1986). The Court must view the facts and the inferences drawn from the facts in the light most favorable to the nonmoving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986). Conclusory allegations are not sufficient to defeat a motion for summary judgment. *Cf. Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

The material facts in this case are not contested. The parties' dispute — whether Raleigh's special use permitting procedure is constitutional as applied to topless dancing establishments — is entirely a question of law.

This Court need not address this question in detail, because the Fourth Circuit already has. While the Fourth Circuit did not determine whether Raleigh's permitting procedure would be constitutional as applied to other forms of expression or other exercises of First Amendment rights, the Fourth Circuit clearly stated that Raleigh's "special use permit process is not unconstitutional as it pertains to topless

dancing bars." *Steakhouse, Inc.*, 166 F.3d at 642. On the basis of this determination alone, Defendants are entitled to summary judgment.

While Plaintiffs claim that Raleigh's special use permit scheme is an unconstitutional prior restraint on speech, the Fourth Circuit disagreed. As the Fourth Circuit explained, "Raleigh's special use permit process . . . serves simply to protect Raleigh's citizenry from the negative secondary effects associated with such [topless dancing] establishments." *Id.*

The Fourth Circuit specifically found that Raleigh's special use permit scheme provides clear criteria for the Board of Adjustment's determinations, provides a reasonable time frame for the Board of Adjustment's administrative decisions,[2] and (combined with N.C.G.S. § 160A-388) provides an appropriate avenue for prompt judicial review of the Board of Adjustment's determinations. *See id.* at 639-642. For these and other reasons,[3] the Fourth Circuit found,

---

2. As discussed by the Fourth Circuit in its decision in this case, the Board of Adjustment has amended its procedural rules for special use permitting since this suit began. The new rules require the Board of Adjustment to make a determination within 90 days of receiving an application and facilitate prompt judicial review of the Board of Adjustment's decisions. *See Steakhouse, Inc. v. City of Raleigh*, 166 F.3d 634, 636 n.2 (4th Cir. 1999).

3. It appears that to the Court that a number of adult establishments such as topless dancing bars are currently operating in the City of Raleigh. This indicates that Raleigh's special use scheme indeed focuses on legitimate variables inherent in development (parking, police protection, noise, stormwater run-off, etc.) rather than speech and expression.

as this Court must, that Raleigh's special use permit process is constitutional as it pertains to topless dancing bars. Defendants are entitled to summary judgment.

CONCLUSION

For the reasons discussed above, Defendants' Motion for Summary Judgment is GRANTED. Accordingly, Plaintiffs complaint is DISMISSED.

SO ORDERED.

This 15th day of March, 1999.

s/ Terrence W. Boyle
TERRENCE W. BOYLE
CHIEF UNITED STATES
DISTRICT JUDGE

APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA DATED, ENTERED AND FILED MARCH 17, 1999

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA

Case Number 5:97-CV-177-BO

STEAKHOUSE, INC., a Florida Corporation and INVESTMENT PARTNERS, INC., a Florida Corporation,

Plaintiff,

v.

THE CITY OF RALEIGH, NORTH CAROLINA, a North Carolina municipal corporation, and RALEIGH BOARD OF ADJUSTMENT,

Defendants.

Judgment in a Civil Case

* * *

X **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the Defendants' Motion for Summary Judgment is GRANTED and this action is hereby DISMISSED.

Appendix C

JUDGMENT FILED AND ENTERED THIS DAY OF 1998.

* * *

March 17, 1999

DAVID W. DANIEL, CLERK

By: s/ Rebecca Bowen
Deputy Clerk

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, WESTERN DIVISION DATED SEPTEMBER 2, 1997 AND FILED SEPTEMBER 4, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

No. 5:97-CV-177-BO(1)

STEAKHOUSE, INC., a Florida Corporation, and INVESTMENT PARTNERS, INC., a Florida Corporation,

Plaintiffs,

v.

THE CITY OF RALEIGH, NORTH CAROLINA, a North Carolina municipal corporation, and RALEIGH BOARD OF ADJUSTMENT,

Defendants.

ORDER

This matter comes before the court on Plaintiffs' motion for a preliminary injunction pursuant to Rule 65(a) of the Federal Rules of Civil Procedure. For the reasons set forth below, this motion is denied.

BACKGROUND

In November, 1996, Plaintiff Steakhouse, Inc., through J.R. and Mary Ogburn, filed an application with the City of

Appendix D

Raleigh Planning Department for approval of a site plan for a restaurant and lounge on the Northwest corner of Westgate Road and Glenwood Avenue.[1] This lot is located in an area zoned Thoroughfare District, with an Airport District Overlay. On November 13, 1996, Plaintiff Steakhouse filed an application for a special use permit to operate an adult establishment on the site. A special use permit is required to operate an adult establishment within the zoning area chosen by Plaintiff to build. Such permits are issued by the Raleigh Board of Adjustment (hereinafter, "BOA"), a quasi-governmental body convened under the laws of North Carolina to issue permits for zoning issues such as these.

The BOA planned to hear Plaintiff's application at its next meeting on December 9, 1996. At the request of Plaintiff's counsel, however, this consideration was put off until the next BOA meeting on January 13, 1997. At this meeting, the BOA voted unanimously to deny Plaintiff's application, and published findings of fact and conclusions to this effect.

Plaintiff seeks to enjoin Defendants from applying the applicable zoning and land use ordinances of the Raleigh City Code to Plaintiff's application.

---

1. Plaintiff Investment Partners' place in this motion is unclear. According to the complaint, "Plaintiff Partners desires to open an adult entertainment establishment or buy an existing adult entertainment establishment of the same nature as that proposed by the Plaintiff Steakhouse." ¶11. There is no indication that Investment Partners has initiated any applications before the Raleigh Board of Planning or the Board of Adjustment; in fact, no zoning or land use action is required it an existing adult entertainment establishment is purchased. Plaintiff Investment Partners thus has no grounds to move for a preliminary injunction at this stage.

Appendix D

DISCUSSION

The standard for the awarding of preliminary injunctive relief in the Fourth Circuit is the "balance-of-hardships" test described in *Blackwelder Furniture Co., Etc. v. Seilig Mfg. Co., Inc.*, 550 F.2d 189, 196 (4th Cir. 1977). This test requires a district court to balance the irreparable harm or injury imposed upon the plaintiff if permanent relief is denied against the harm to the defendant if relief is granted. Based on the outcome of this balancing, the court must then determine the degree by which a likelihood of success on the merits must be established before relief may be granted. *Direx Israel, Ltd. v. Breakthrough Medical Corp.*, 952 F.2d 802, 811 (4th Cir. 1991). The more the balance favors the plaintiff, the less likelihood of success he must establish; conversely, a smaller discrepancy, or a balance favoring the defendant, requires a strong probability of success on the merits. *Faulkner v. Jones*, 10 F.3d 226, 233 (4th Cir. 1993); *Blackwelder*, 550 F.2d at 195. Finally, the court must consider the public interest. The burden rests on the plaintiff throughout. *Direx Israel*, 952 F.2d at 812.

The First Amendment to the United States Constitution provides "Congress shall make no law . . . abridging the freedom of speech." That prohibition has been extended by the courts against state and local governments by the application of the Fourteenth Amendment to the United States Constitution which provides in pertinent part that "no State shall make or enforce any law which shall deprive any person of . . . liberty or property, without due process of law."

Appendix D

The Plaintiff claims that nude or topless dancing is conduct that is entitled to be treated as public speech and afforded First Amendment constitutional protection under the "freedom of speech" clause.

Regardless of the legitimacy of this claim, the court need not decide this case on "freedom of speech" grounds since, under the discreet facts of this case, Plaintiff's anticipated topless dancing activities may be temporarily abridged based on concerns unrelated to freedom of speech. The Defendants' refusal to grant a permit at this time is nothing more than a reasonable land use restriction based on the BOA's findings and its conclusion that Plaintiff has failed to show that its proposed use would not threaten public services and facilities, and would not adversely impact neighboring properties. Such a transitory limitation to Plaintiff's free speech is not the sort of irreparable harm required to tilt the *Blackwelder* balance in Plaintiff's favor.

This finding requires Plaintiff to show that the harm to Defendants from the issuance of the prayed-for relief would be negligible. Plaintiff does not carry this burden. The BOA concluded that Plaintiff's application for a special use permit failed to show that the proposed use will not adversely impact public services and facilities, such as parking, traffic, and police; and will not adversely impact adjacent properties, for example from storm water runoff and pedestrian safety hazards. The BOA's finding that the effect of Plaintiff's proposed development on local traffic and safety conditions would be negative is a valid ground for the denial of the special use permit. *Ghidorzi Construction, Inc. v. Chapel Hill*, 80 N.C.App. 438, 444 (1986).

Further, the granting of a preliminary injunction may vest rights in Plaintiff under Section 160A-385.1 of the North Carolina General Statutes ("A vested right shall be deemed established with respect to any property upon the valid approval . . . of a site-specific development plan. . . . Such vested right shall confer upon the landowner the right to undertake and complete the development and use of said property under the terms and conditions of the site-specific development plan. . . ."). Such a vesting would allow Plaintiff to continue its site development and commence operations. If the court then determined that permanent injunctive relief was not proper, the Defendants would suffer harm from having to force Plaintiff to desist and to dismantle its operations. The balance of equities thus clearly favors Defendants.

It is therefore incumbent upon Plaintiff to demonstrate a high likelihood of success on the merits. As discussed above, the BOA concluded that Plaintiff's application for a special use permit failed to show that the proposed use will not adversely impact public services and facilities, and that it will not adversely affect adjacent properties. While these findings may be based on insufficient grounds, or may be flatly incorrect, this is not the proper forum in which to make those inquiries. Those questions are more appropriately addressed to the North Carolina state courts, to which Plaintiff has recourse through a writ of certiorari as part of the zoning variance procedure.

Plaintiff has also failed to satisfy the court at this stage that the special use permit requirement itself constitutes a prior restraint. While petitioners seeking to establish a new adult entertainment establishment must obtain a special use

permit, a purchaser of an existing adult establishment does not. Also, other uses of land, such as restaurants, lounges, and parking lots, are subject to special use permit requirements. Thus Plaintiff has not established the prima facie elements of a claim based on prior restraint of its First Amendment rights.

Even in the event that Plaintiff is successful at trial in establishing that the City's ordinances constitute a prior restraint, its battle is not won. A zoning ordinance that constitutes a prior restraint on speech must meet the two requirements elucidated by the Fourth Circuit in 11126 *Baltimore Boulevard v. Prince George's County*, 58 F.3d 988, 998, *cert. denied*, __ U.S. __, 116 S. Ct. 567, 133 L.Ed.2d 492 (1995): it must provide for a determination in a specified and reasonably brief period of time; and it must assure prompt judicial review of an administrative denial. In the instant case, the BOA's determination was certainly prompt (the application was filed in November, and decided on January 13, 1997; it would have been decided in December, but Plaintiff's counsel asked that it be moved back).[2] The second *Baltimore Boulevard* prong is satisfied by the possibility of seeking a writ of certiorari in the North Carolina courts.[3]

---

2. Indeed, the BOA's own regulations require it to hear applications at its next board meeting if filed in time; such restrictions fulfill the obligations imposed by Baltimore Boulevard. *Id.* at 1004 n. 18.

3. In fact, the BOA's regulations now provide that it will stipulate to any request for certiorari made to the superior court, making such review almost guaranteed to any petitioner whose permit application is denied, should he seek such review.

Appendix D

Also, Plaintiff is unlikely to succeed on its claim that the Defendant City's zoning ordinances effectively ban adult entertainment. The City's Planning Director submitted an affidavit attesting to the fact that eleven full-time adult establishments currently operate in Raleigh. Plaintiff has thus failed to convince the court of a high probability of success on the merits of its claim.

With respect to the public interest, the court notes that it would be contrary to the public interest to permit Plaintiff to operate a business in an environment which may have deleterious safety effects on the community and surrounding businesses. Finally, and more generally, the community certainly does not benefit from federal court forays into the business of issuing land use permits.

CONCLUSION

Plaintiff has failed to carry its burden of satisfying the four-prong *Blackwelder* inquiry. For the reasons stated above, Plaintiff's motion for preliminary injunction is DENIED.

SO ORDERED.

This 2nd day of September, 1997.

s/ Terrence W. Boyle
TERRENCE W. BOYLE
UNITED STATES DISTRICT
JUDGE

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED MARCH 6, 2001

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 99-1542
CA-97-177-5-BO

STEAKHOUSE, INCORPORATED, a Florida corporation;
INVESTMENT PARTNERS, INCORPORATED,
a Florida corporation

Plaintiffs – Appellants

v.

THE CITY OF RALEIGH, NORTH CAROLINA,
a North Carolina municipal corporation;
RALEIGH BOARD OF ADJUSTMENT

Defendants – Appellees

On Petition for Rehearing and Rehearing En Banc

Appellants' petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

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As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,

/s/ Patricia S. Connor
CLERK

APPENDIX F — RALEIGH CITY CODE'S DEVELOPMENT REGULATIONS, SECTION 10-2144

Sec. 10-2144.

SPECIAL USE PERMITS APPROVED BY THE BOARD OF ADJUSTMENT.

Special use permits — alphabetical listing:

— *Adult establishment.*

— Airfield, landing strip and heliport.

— *Bed and breakfast inn.*

— *Day care facility* (child or adult).

— *Eating establishment.*

— Garage for four (4) or more motorized vehicles *accessory* to a *single family* detached or *duplex dwelling.*

— *Ground signs* for double *frontage lots* with parallel opposite one-way *streets*, or *lots* with *frontage* on two (2) or more median-divided *thoroughfares*.

— Guest house.

— Kennel and cattery.

— *Limited home business*.

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— *Manufacturing – specialized.*

— Nonresidential related service (general).

— Other professional or service offices, studios, or *agencies* not otherwise listed as permitted in the *office and institution* and Residential Business Districts.

— Parking (off-street) reduction for conversions or alteration of a *building*.

— Plant nursery, and fruit and vegetable stand.

— *Recreational use restricted to membership – not for profit.*

— *Retail sales* not otherwise listed as permitted in the Residential Business and Buffer Commercial Districts.

— Riding stable.

— *Rooming house, boarding house, lodging house, tourist home.*

— School, church or government *building* adaptively reused as an office or studio, operating on a not for profit basis, for a professional, business, political, or labor association or *agency*.

— Schools – private/parochial.

— *Specialty school* as a *limited home business.*

— Trade show and temporary retail activity within a *hotel* or *motel*.

— *Veterinary hospital* in conjunction with a kennel/cattery.

— Yard encroachments.

— Yard reductions.

* * *

(a) Special Use Permits Approved.

In performing its functions and duties under this chapter, the Board of Adjustment *following* the submittal of a plan containing the information required in §10-2132.1(b) and after making the necessary findings is authorized to issue special use permits to allow the enumerated *buildings*, uses, and designs in the districts specified in subsection (b) below. The districts referred to herein apply to general use and conditional use districts unless the applicable conditional use district ordinance specifically states otherwise.

* * *

(b) Special Use Permits Enumerated.

Adult establishment.

To permit an *adult establishment* in industrial districts, Shopping Center, Neighborhood Business, Business

Zone, and Thoroughfare Districts after the Board finds that the evidence presented at the hearing establishes each of the *following*:

(1) Off-street parking.

Each facility *shall* provide off-street parking in accordance with §10-2081.

(2) Advertisements.

Except for *on-premise* and *off-premise signs* permitted under this chapter, advertisements, displays or other promotional materials *shall* not be visible to the public from pedestrian sidewalks or walkways.

(3) Overconcentration.

No more than one (1) *adult establishment* is located in any two thousand (2,000) foot radius (determined by a straight line and not *street* distance). *Adult establishments* which, because of their very nature, are recognized as having serious objectionable operational characteristics upon adjacent neighborhoods, particularly when they are concentrated. Special regulation of these establishments is necessary to insure that these adverse effects will not contribute to the blighting or downgrading of the surrounding neighborhood. To prevent an overconcentration of *adult establishments* and the creation of a de facto

downgrading or blighting of surrounding neighborhoods; this radius requirement is necessary, unless otherwise determined under subparagraph (5) below.

(4) Residential proximity.

No adult establishment is located within a two thousand (2,000) foot radius (determined by a straight line and not *street* distance) of any place of worship, school (public or private), *specialty school*, day-care facility, or any residential, O&I-1, O&I-2 and Buffer Commercial zoning districts. *Adult establishments*, because of their very nature, are recognized as having serious objectionable operational characteristics, particularly when they are located near a *residential zoning district* or certain other districts which permit residential uses. Special regulation of these establishments is necessary to insure that these adverse effects will not contribute to a downgrading or blighting of surrounding *residential districts* or certain other districts which permit residential uses, unless otherwise, determined by subparagraph (5) below.

(5) Variances.

The Board of Adjustment *shall* vary the radius requirements in subparagraphs (3) and (4) above when it finds that:

a. Practical difficulties or unnecessary hardships would result from the strict enforcement of the radius requirements.

b. The proposed use will not be injurious to *property* or improvements in the *affected area.*

c. The proposed use will not enlarge or encourage the development of a "skid row" area.

d. The permitting of an *adult establishment* in the area will not be contrary to any governmental program of neighborhood conservation, rehabilitation, improvement, or revitalization.

e. All other applicable provisions of this chapter will be observed.

(6) The proposed use will not adversely impact public services and facilities such as parking, traffic, police, etc., and that the secondary effects of such uses will not adversely impact on adjacent *properties*. The secondary effects would include but not be limited to noise, light, stormwater runoff, parking, pedestrian circulation and safety.

When determining preponderance of adult materials, only those objects which have equal access and visibility *shall* be considered.

* * *

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Airfield, landing strip, and heliport.

To permit a government or nongovernment air field or landing strip in all zoning districts other than Conservation Management, and except in a *primary reservoir watershed protection area*, after the Board finds that the evidence presented at the hearing establishes each of the *following*:

(1) The use is not injurious to surrounding *properties*.

(2) For airplane use:

a. Proof of air space clearance from F.A.A. is required.

b. The minimum landing strip length is one thousand eight hundred (1,800) feet. The length *shall* be increased twenty (20) per cent for each one (1) per cent gradient. The minimum width is one hundred fifty (150) feet.

c. The minimum runway length is one thousand six hundred (1,600) feet, and the minimum width is seventy-five (75) feet for sod, forty (40) feet for a paved surface.

d. The maximum gradient for a runway is two (2) per cent.

e. The approach slope *shall* begin at least two hundred (200) feet beyond end of runway, and be at least a 20:1 slope.

f. The length of the clear zone to be controlled and maintained by the airfield developer (no *buildings* allowed) such that future construction is prohibited (*streets*, lakes, etc.), is one thousand (1,000) feet.

g. There *shall* be a planted area at least twenty-five (25) feet wide on both sides of the landing strip, provided and maintained by the airfield *owner*(s) in such a manner as to minimize noise, dust and hazard from the field, in areas where in the opinion of the Board such protection is found to be desirable.

h. Except in areas properly zoned for such uses there *shall* be no prima facie business, repair, or advertisement, except for the sale of gasoline to the planes based at the field.

i. Any structures must be so designed and placed that they will not be detrimental to adjoining *properties*.

j. The area *shall* be so fenced as to prevent trespassing by animals or unauthorized *persons*.

(3) For heliports:

a. Proof of air space clearance from the Federal Aviation Agency is required.

b. Paragraphs h. and i. in the *preceding* subsection (2) above are met.

* * *

Bed and breakfast inn.

To permit a *bed and breakfast inn* in Residential-10, Residential-15, Residential-20, Special Residential-30, Residential-30, Residential Business, Office and Institution-1 Districts, and the Planned Development Conditional Use Overlay District, after the Board finds that the evidence presented at the hearing establishes each of the *following*:

(1) The inn is located within one (1) or more of the *following*:

a. An Historic Overlay District.

b. A *property* designated in accordance with §10-1034 as a Raleigh historic *property*.

c. A *property* listed on the National Register of Historic Places.

d. A *property* identified as a contributing structure within a National Register Historic District, as defined in the **Code of Federal Regulations**, as amended.

(2) The inn is located in a structure which was originally constructed as a *single-family dwelling*

or otherwise lawfully constructed for a use permitted within the zoning district.

(3) The total number of *persons* occupying the inn does not exceed the maximum residential density permitted in the district.

(4) There is no exterior advertising in a *residential districts* except a small unlighted announcement *sign* not to exceed two (2) square feet in area and three and one-half (3 1/2) feet in height. In the Residential Business and Office and Institution-1 District, the inn is permitted all signage allowed other uses in the District, consistent with any limitations imposed by this special use permit or any other permit issued by the *City*.

(5) There is no *rooming house*, *boarding house*, *tourist home*, or *bed and breakfast inn* located within four hundred (400) feet (determined by a straight line and not *street* distance) of the facility.

(6) The *owner* of the inn or a resident manager is domiciled on the *premise*.

(7) Breakfasts served on the *premise* are only for guests of the inn, and no other meals as provided on the *premise*.

(8) Off-street parking for the use will be provided in accordance with §10-2081.

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(9) Any prohibited exterior element as described in **"Guidelines and Standards for the Rehabilitation of Early Raleigh Neighborhoods and Buildings," "Guidelines for Exterior Rehabilitation for the Moore Square Historic District," "The Secretary of the Interior's Guidelines for Rehabilitating Historic Buildings"** (To be *used for properties* of *the State*), or **"Guidelines and Standards for New Construction in Early Raleigh Neighborhoods,"** which is on file in the City Clerk's Office, *shall* be removed from the structure prior to its use as a *bed and breakfast inn.*

(10) Any interior modification *shall* be described in the application and *shall* not be injurious to the historic character of the structure, woodwork, stairways, fireplaces, windows and doors, cornices, festoons, moldings, chairrails, or light fixtures.

* * *

***Day care facility* (child or adult).**

To permit a *day care facility* in any *residential district* except in an Airport Overlay District or *primary reservoir watershed protection area* after the Board finds that the evidence presented at the hearing establishes each of the *following*:

(1) The use will not be injurious to *property* or improvements in the *affected area.*

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